STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Central Illinois Light Company d/b/a AmerenCILCO Proposed general increase in electric delivery service rates.	))))	Docket No. 09-0306
Central Illinois Public Service Company d/b/a AmerenCIPS Proposed general increase in electric delivery service rates.	))))	Docket No. 09-0307
Illinois Power Company d/b/a AmerenIP Proposed general increase in electric delivery service rates.	))))	Docket No. 09-0308
Central Illinois Light Company d/b/a AmerenCILCO Proposed general decrease in gas delivery service rates.	))))	Docket No. 09-0309
Central Illinois Public Service Company d/b/a AmerenCIPS Proposed general increase in gas delivery service rates.	))))	Docket No. 09-0310
Illinois Power Company d/b/a AmerenIP Proposed general increase in gas delivery service rates.	)))	Docket No. 09-0311 (Consolidated)

REPLY BRIEF ON REHEARING OF THE AMEREN ILLINOIS UTILITIES

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I. Introduction

The Staff and Intervenor Initial Briefs invite the Commission to indulge in arbitrary and capricious decision-making that will not withstand appeal. With regard to accumulated depreciation, the issue before the Commission is whether it is necessary to "roll forward" the balance of accumulated depreciation for test year plant in service to match the period of pro forma plant additions. In each of the four contested cases where the Commission has previously addressed this issue, the Commission has held that its test year rules prohibit such an adjustment. Staff and Intervenors barely mention these cases, let alone distinguish them from the facts and circumstances of this case. Staff and Intervenors are free to ignore prior Commission decisions, but the Commission is not. As the Commission itself has recognized – and, indeed, recently argued to two Illinois Courts of Appeal – a change in interpretation of test year rules to mandate a roll-forward of accumulated depreciation on test year plant would be arbitrary and capricious. If the Commission wants to change its test year rules, it must do so in a rulemaking.

Adopting Staff's position on pension and OPEB expense would be equally arbitrary and capricious. The Commission routinely approves adjustments to pension and OPEB expense based on the most recent actuarial data available at the time the utility files its case, or data that becomes available during the course of the case prior to hearing. In their direct case, the AIU provided actuarial data that supports a pro forma adjustment to pension and OPEB expense. The actuarial data provided by the AIU is the same type of data that Staff has previously relied on to advocate a downward adjustment to pension and OPEB expense. To find that actuarial data may be used to support a reduction to pension and OPEB expense, but not a pro forma adjustment that properly recognizes a legitimate, known and measurable increase in this expense, would be an arbitrary and capricious departure from prior Commission practice.

Adopting IIEC's recommended position on cash working capital would also be arbitrary and capricious. Simply stated, to accept IIEC's position would require the Commission to substitute a calculated collection lag with a proxy unsupported by any analysis of customer payment patterns. The AIU have customers who pay their bills late. The consequence of late payments to the AIU is that working capital funds must be obtained from some other source. The costs related to late payments are largely determined through the collection lag component of revenue lag, as measured in a lead/lag study. The costs associated with AIU's actual calculated collection lag should be included in the revenue requirement, as Staff agrees.

With respect to PURA tax, the AIU have proposed to recover the tax in a manner that is fully consistent with the Commission's stated intent. As well, IIEC's invitation to the Commission to engage in retroactive ratemaking concerning collection of PURA tax should be rejected.

The AIU have proven on rehearing that the April 29 Order, as corrected by the May 6 Order, ("Order") understates their combined revenue requirement by approximately $55 million. (AIU Init. Reh. Br., pp. 1-2.) The Order on Rehearing must correct this deficiency.

II. What Is The Appropriate Application/Interpretation Of 83 Ill. Adm. Code 287.40 And 220 ILCS 5/9-211 In The Context Of Adjustments To Accumulated Depreciation Reserve?

No party disputes that the AIU may propose an adjustment to test year plant to recognize post-test year plant additions reasonably certain to be placed in service during the pro forma period. (AIU Init. Reh. Br., p. 3.) Nor does any party disagree that a related adjustment should be made to test year accumulated depreciation to account for the change in depreciation expense associated with that post-test year plant. (Id., pp. 3, 13.) That the parties cannot agree on the *extent* of the adjustment to test year accumulated depreciation, however, is apparent.

Staff, IIEC and AG-CUB all contend that the accumulated depreciation reserve should be restated as of the end of February 2010 to offset the pro forma plant additions. Why such an adjustment remains inappropriate already has been addressed at length. As explained in the AIU's initial brief, no such automatic "roll forward" of test year accumulated depreciation is warranted simply because the utility proposes to add pro forma plant to its test year balance of plant. Part 287.40 and Section 9-211 permit a utility to include known and measurable post-test year plant additions (and depreciation related to that plant investment) to test year balances, *as if* those "pro forma" additions had been completed and placed in service during the test year. (Id., pp. 2, 4.) But neither Part 287.40 nor Section 9-211 requires a "roll forward" of test year accumulated depreciation to the end of the pro forma period to recognize the potential change in depreciation associated with embedded plant. (Id., pp. 2-8.) Nor do regulatory accounting and ratemaking principles require the "roll forward" of the reserve as a matching adjustment to counter the increase in plant in service and avoid an "overstated" rate base. (Id., pp. 8-12.)

The AIU simply note that, amongst the competing proposals presented on rehearing, the AIU's interpretation of Part 287.40 is the only one with the added benefit of explicit support in four prior Commission rate cases involving major electric or gas utilities. In ComEd, 05-0597, the Commission expressly rejected (for the second time) the same adjustment to accumulated depreciation proposed here by Staff, IIEC and AG/CUB. The Commission found that a roll forward of test year accumulated depreciation "does not correlate to any pro forma [] capital additions or any plant adjustment proposed by any of the parties" and "merely takes one part of the rate base and moves it one additional year into the future." Order, July 26, 2006, p. 15. The "effect of the [] proposed adjustment," the Commission observed, "would be to inappropriately

bring the test year into the future for accumulated depreciation. The Commission correctly held that its own "rules and test year ratemaking principles prohibit such an adjustment." Id.

Seventeen months later, in North Shore/Peoples, 07-0141/0142, the Commission again rejected the same proposed adjustment. The Commission noted that "this issue has been previously addressed by the Commission" and reminded the parties that "Commission action brings certainty to a situation and settles expectation." Order, Feb. 5, 2008, p. 16. The facts in Docket 07-0141/0142, the Commission found, "most closely resemble the situation that we most recently considered in Docket 05-0597. Id. Thus "the outcome of the 05-0597 proceeding [was] controlling." Id., p. 17. "[U]nless there are clear and distinguishable reasons for deciding a case differently, the Commission will follow in line with precedent" to avoid "a charge of arbitrary and capricious action." Id., p. 16. In Docket 07-0141/0142, however, there was no reason to cause the Commission to depart from its prior decision set out in Docket 05-0597. Thus, the Commission found itself "unable to lawfully deviate from that [decision]." Id., p. 17.

Seven months later, in ComEd, 07-0566, the Commission rejected the same adjustment for the fourth time. The Commission noted that "these arguments are not novel arguments as the Commission has reviewed the merits of this position in at least three cases in the recent past." Order, Sept. 10, 2008, p. 28. In Docket 07-0141/0142, the Commission "strove to make clear" that the adjustment was not appropriate. Id., p. 29. In Docket 07-0566, the Commission was not persuaded by the same "reconstituted arguments" "against the backdrop of consistent fact patterns." Id. "In order for the Commission to do an about face with regard to its decisions, parties must make a clear showing as to the appropriateness of such a change by way of proper evidentiary and legal support for us to consider such departures from settled precedent." Id., p.

30. As with Docket 07-0141/0142, nothing in the record in Docket 07-566 provided support for the Commission to disavow its previous determination that the adjustment was improper. Id.

For the past two years and during the *entirety of this case*, the Commission vigorously has affirmed and defended on appeal its prior determinations rejecting the proposed "roll forward" adjustment. (See ICC Brief, June 30, 2009, Commonwealth Edison Co. v. Illinois Commerce Commission, No. 2-08-0959 (Cons.) ("ICC ComEd Br."); ICC Oral Argument, Aug. 18, 2010, Commonwealth Edison Co. v. Illinois Commerce Commission, No. 2-08-0959 (Cons.).)[1] Thus, it is without question that the Commission repeatedly has found – and to this day still insists –both that the proposed adjustment "does not correlate to any pro forma capital additions," (Order, North Shore/Peoples, 07-0141/0142, p. 16), and that "a general restatement of the depreciation on rate base in a historical test year case is not supported by Commission test year rules, Illinois law or applicable Commission decisions," (ICC ComEd Br., p. 7).

Staff and Intervenors unsurprisingly lash out at the testimony of AIU witness Mr. Fiorella in an effort to "kill the messenger" who explains the basis for the Commission's continued and current rejection of their proposed adjustment. Staff, in particular, wrongly claims that "Mr. Fiorella adapts the Commission's rules and policies to fit his own purposes." (Staff Init. Reh. Br., p. 5.) Mr. Fiorella's testimony, however, is no different from what the Commission already has said about its rules and policies in rejecting Staff and Intervenors' proposed adjustment four times previously and in defending on appeal its most recent orders rejecting the adjustment in North Shore/Peoples, 07-0141/0142, and ComEd, 07-0566. Far from wavering in his opinions, Mr. Fiorella stated repeatedly on cross-examination that his testimony explained how the AIU

[1] The Commission's appellate briefs for ComEd, Docket 07-0566 and North Shore/Peoples, Docket 07-0141/0142, are attached to the AIU's Post-Hearing Reply Brief as Appendices A and B. The Commission's oral argument may be found at http://www.state.il.us/court/Media/Appellate/2nd_District.asp.

"adhered to" and "follow[ed] the Commission's rules, guidelines, its past policy and precedent with respect to the test year [and] with respect to pro forma additions," consistent with the Commission's own conclusions in the three ComEd cases and the North Shore/Peoples case. (Reh. Tr. 47; see also Reh. Tr. 39-40.) Ironically, Staff is the party playing fast and loose with the Commission's prior determinations on this issue by ignoring the very decisions that have explicitly addressed and rejected the proposed adjustment.[2] (AIU Init. Reh. Br., p. 8.) Indeed, if anything, that Staff complains about Mr. Fiorella's recounting of the Commission's long standing practice in denying Staff's proposed adjustment, while it rejects that practice or feigns ignorance about this precedent is what lacks credibility and is "clearly absurd." (Staff Init. Reh. Br., p. 6.)

Staff and Intervenors claim that the Commission is not bound by prior orders, but if it considers them at all, it should only adhere to and follow a handful of random, unconnected decisions where the proposed adjustment was not contested by the utility. Indeed, Staff goes so far as to quibble with Mr. Fiorella's contention that Commission has never authorized the adjustment when it was contested by a utility. (Staff Init. Reh. Br., pp. 5-6.) Notably, every order but one (Illinois Gas, 08-0482) relied on by Staff and Intervenors predates the Commission's rejection of the adjustment in Dockets 05-0597, 07-0141/0142 and 07-0566, thereby calling into question any relevance they may still have. Moreover, every AIU order but one (AmerenIP Gas, 04-0476) involved "limited" or no pro forma capital additions. (AIU Init. Reh. Br., pp. 7-8.) More importantly, in *every* case cited by Staff or Intervenors where

[2] In prefiled testimony, Staff acknowledged two cases in which the Commission did not roll forward accumulated depreciation, despite the utility proposing "substantial" pro forma capital additions (ComEd, 05-0597 and North Shore/Peoples, 07-0241/0242). On cross-examination, Staff also acknowledged that the pro form plant adjustment in ComEd, 07-0566, in which the proposed roll forward of the reserve was rejected, was "substantial." (Reh. Tr. 161.) Despite this apparent awareness of decisions adverse to its position – *decisions that have been discussed at length in the parties' testimony and briefing both in the initial phase of this proceeding and on rehearing* – Staff conceded on the stand and in discovery responses that it had not reviewed the record of *any* of the four prior orders in which Staff's proposed post-test year adjustment to accumulated depreciation was rejected. (Reh. Tr. 158-163; Staff Resp. to AIU ICC 39.01, 390.03, 39.06 and 41.08, included in Ameren Cross Ex. 1.)

accumulated depreciation for embedded plant was "rolled forward," the adjustment was agreed to or not specifically disputed. (See ICC Staff Ex. 1.0RH-R (Ebrey Dir.), pp. 9-10 & fn. 4 & 6-8 (Dockets Nos. 08-0482, 94-0270, 85-0166, 83-0433); id., p. 15 (Docket No. 04-0576)).

That other Commission orders, such as the orders in Inter-State Water, 94-0270 and Illinois Gas, 08-0482, may have approved uncontested or nominal post-test year adjustments to accumulated depreciation on embedded plant is neither relevant nor controlling, particularly in light of the Commission's recent decisions explicitly condemning the adjustment, where, as Ms. Ebrey concedes, "significant" plant additions were approved. That they cannot locate a single prior decision that affirmatively and expressly adopts their proposal as appropriate, when contested by the utility requesting a pro forma adjustment to plant, refutes the contention that "the Commission has reached various conclusions about the issue." (Staff Init. Reh. Br., p. 4.) As Mr. Fiorella explained on cross-examination, in "the cases that are on point, where the pro forma addition was accepted and the reserve was contested, the Commission has always found that the AIU adjustment . . . has been accepted." (Reh. Tr. 32.) Staff and Intervenors have not and cannot refute this testimony.[3]

Staff and Intervenors cannot explain why it would be valid for the Commission to base its decision on a few random Commission orders where the approved adjustment was agreed to or not contested and ignore an entire line of precedent directly on point where, like here, the parties have fully litigated the issue. Nor can they explain why it would be valid for the Commission to

[3] Indeed, rather than refute Mr. Fiorella's recitation and explanation of the Commission prior determinations in the ComEd and North Shore/Peoples cases, Staff' "adapts" Mr Fiorella's testimony "to fit [its] own purposes." Contrary to Staff's suggestions, Mr. Fiorella was familiar with the cases that Staff relied upon – as well as the cases that Staff chose not to rely upon. In response to Staff's questions, Mr. Fiorella painstakingly explained why Staff's cited authority was not "on point" because either the contested issue was the pro forma plant additions themselves or the case involved an adjustment to accumulated depreciation agreed upon or of a nominal amount. Staff"s attempt to misconstrue and muddy the record by claiming that Mr. Fiorella "wavers," "could not decide" or offered opinions that "could not be supported" should be ignored. Any doubts about the accuracy of Mr. Fiorella's testimony can be resolved by reviewing the order and records in the Commission cases rejecting the very adjustment that Staff now so passionately supports.

arbitrarily and discriminatorily impose the adjustment upon the AIU in the wake of the Commission's determinations in and defense of the orders in North Shore/Peoples, 07-0141/0142 and ComEd, 07-0566. That the Commission may have approved the proposed adjustment at some point in the past does not give the Commission "carte blanche" to haphazardly impose the adjustment on select utilities contesting the adjustment. Nor can the Commission rely on its responsibility to decide each case based on the specific facts in that case's record "to do an about face," (Order, ComEd, 07-566, p. 30), and accept without reservation an adjustment four times explicitly rejected. That Staff did not review the record of any of the prior orders in which a post-test year adjustment to accumulated depreciation was expressly contested and explicitly rejected, (AIU Init. Reh. Br., pp. 7-8), does not give the Commission the discretion to similarly disregard prior decisions directly on point.

As the Administrative Law Judge Proposed Order ("ALJPO") properly recognized, these four prior decisions "effectively reject the proposition that adopting a pro forma plant adjustment necessitates updating the reserve for accumulated depreciation related to test year assets." (ALJPO, p. 30.) For the Commission to deviate from prior interpretation and practice, "there must be a discernable reason" between the facts here and the facts in those prior cases. (Id., p. 29.) Here, there is no such discernable reason. The ALJPO correctly found that no "meaningful difference" exists between the record here and the records in those prior cases. (Id., p. 30.) As in those prior cases, in this proceeding, there remains "no basis to accept the proposal to make an adjustment to the reserve for accumulated depreciation for test year plant." (Id.)

Staff and Intervenors' proposed roll forward adjustment, however, should not just be rejected out of adherence to Commission test year rules and its prior established determinations. On its face, the proposed roll forward in principle results in rates unjust and unreasonably low

for the utility. Here, as in the Commission's four prior decisions on point, "a utility was investing in its system at a rate such that net plant was increasing at a significant rate year after year." Order, ComEd, 07-566, p. 30; see Ameren Ex. 29.19; Ameren Ex. 11.5RH. Here, as in those decisions, there is no dispute that the utility will continue to invest in its plant after the pro forma period. (Resp. to AIU-IIEC 12.13, included in Ameren Cross Ex. 4.) Here, as in those decisions, the utility proposed to recognize prospectively a portion of that capital investment reasonably certain to occur so that their rates could more adequately and timely offset the costs of that investment as they are incurred. Here, as in those decisions, the AIU made the related depreciation adjustments to the reserve only for the post-test year plant that comprised the pro forma additions. (Ameren Ex. 2.0RH (Stafford Dir.), pp. 4-5.) That an additional adjustment to roll forward accumulated depreciation on embedded plant would result in a negative rate base reduction in an environment of increasing capital investment in plant is an indication that the adjustment cannot result in just and reasonable rates. (AIU Init. Reh. Br., pp. 9-10.) Indeed, Staff's proposed adjustment, as corrected in its Initial Brief, [4] results in a *negative* rate base reduction for AmerenIP Electric, even though the utility had an *increasing* net plant over the pro forma period, (Ameren Ex. 11.5RH), and would have received a *positive* impact to rate base by proposing to recognize a handful of pro forma capital additions. (AIU Init. Reh. Br., pp. 10-11.)

No party has disputed that the Order's adjustment sets a rate base "net plant" that *understates* the AIU's actual "net plant" per books as of February 2010, months before initial rates from this proceeding were in effect. (AIU Init. Reh. Br., pp. 22-23.) Had the Commission

[4] As shown on Appendix A attached to Ameren's Reply Brief on Rehearing, only IP electric has a negative rate base adjustment under Staff's proposal, after considering Staff's recalculated accumulated depreciation adjustments shown on Staff's Initial Brief on Rehearing Schedule 1.07RH. Staff's recalculated adjustments reflect Staff's acceptance of the adjustment shown on line 3 ("Subtotal ADR without E-Transmission") of Ameren Ex. 11.2RH (Corr.)

accepted the same adjustment in ComEd, 07-0566, the utility's actual net plant would have significantly exceeded rate base net plant the entire time rates would have been in effect. (Ameren Ex. 4.0RH (Dane Dir.); Ameren Ex. 13.0RH (Dane Reb.).) That a utility's rate base net plant may exceed its per books net plant at the end of the pro forma period, if the proposed adjustment is not imposed, is not determinative on whether the adjustment is reasonable and appropriate. Even Staff conceded in its Initial Brief in the initial phase of this proceeding that rate base net plant balance is not "overstated," if it does not exceed "the anticipated actual net plant balance in February 2010 *or during the time that rates from this case are expected to be in effect*." (Staff Init. Reh. Br., p. 11 (emphasis added).) No party put forward any evidence that the AIU would have an "overstated" net plant in rate base *over the period rates will be in effect*, if no post-test year adjustment on embedded plant were made in this proceeding. Thus, the record evidence – as well as the impact of the various proposed adjustments themselves – demonstrates that the only workable, reasonable adjustment to accumulated depreciation is the one proposed by the AIU. Every other adjustment effectively wipes out the benefit of the adjustment and eliminates any chance of the utility mitigating regulatory lag.

The Order on Rehearing should affirm the Commission's settled determination that Part 287.40 and Section 9-211 should not be interpreted and applied to warrant and require the proposed adjustment, as established in the decisions in ComEd, 07-0566, North Shore/Peoples, 07-0241/0242, ComEd, 05-0597, and ComEd, 01-0423, and as affirmed by the Commission in its defense, on appeal, of its orders in ComEd, 07-0566 and North Shore/Peoples, 07-0241/0242.

IV. To The Extent That The Commission Wants To Alter The Manner That It Adjusts Accumulated Depreciation Reserve, What, If Any, Steps Must Be Taken Before Doing So?

The predictability of law and regulation is of paramount importance in establishing a regulatory system that is fundamentally fair to both the regulated entity and the consumer. Rules

are made and policies established to give certainty to and settle parties' expectations. Drastic reversals in agency practice without adequate notice to affected parties threaten the fairness, predictability and stability of the regulatory environment.

If the Commission is concerned with the impact of its prior interpretations and practices concerning Part 287.40 and adjustments to test year accumulated depreciation, the only viable solution is to commence a rulemaking pursuant to Section 10-101 that clearly indicates that the Commission wants to consider changes to Part 287.40, or a new rule altogether, to address the ratemaking treatment of accumulated depreciation. (See AIU Init. Reh. Br., pp. 16-22.) Use of a rulemaking will allow the Commission to issue an order on rehearing that is consistent with its prior decisions, but also provide a forum for the Commission to amend its rule if it so desires.

Staff and Intervenors dismiss the need for a rulemaking by claiming that the Commission is not bound by its prior decisions, and therefore need not be consistent. (Staff Init. Reh. Br., pp. 11-12; IIEC Init. Reh. Br., pp. 27-31; AG/CUB Init. Reh. Br., pp. 13-17.) If the Commission can reject the roll forward in four prior cases and defend that determination on appeal, but require it here under analogous facts, then Staff must believe that the Commission can completely ignore its past practice, a belief not shared by Illinois courts. (AIU Init. Reh. Br., pp. 16-22.) Staff claims that "Based on the history of the last 10 year of Ameren rate cases as discussed in Staff testimony . . . AIU should have known that the Commission would decide the adjustment based on the specific information in evidence in each individual case." (Staff Resp. to AIU-ICC 41.10, included in Ameren Cross Ex. 1.) The Commission, however, cannot do whatever it wants under the cloak of "deciding each case based on its facts." (AIU Init. Reh. Br., pp. 16-22.) It cannot violate the PUA or its own rules. (Id.) It cannot abandon without notice its own long standing determination that a roll forward of accumulated depreciation in this instance is

prohibited. (Id.) And it certainly cannot indiscriminately pick and choose when and on which utilities the proposed adjustment should be imposed. (Id.)

In deciding its prior determinations on this issue, the Commission said that its actions are intended to settle parties' expectations and bring certainty to situations. See supra, pp. 3-4. Relying on that certainty and those settled expectations, the AIU proposed pro forma additions that did not include a roll forward of accumulated depreciation. Throughout this case, the Commission was litigating – and is still litigating – the appeals in ComEd, 07-0566 and North Shore/Peoples, 07-0141/0142, where the Commission continued to defend its settled interpretation and application of Part 287.40 with respect to accumulated depreciation. But here the Commission abruptly has changed its position in the Order – while at the same time continuing to take the exact opposite position in the ComEd and North Shore/Peoples appeals. If the Order's acceptance of the proposed adjustment (or any acceptance of the proposed adjustment in the Order on Rehearing) does not rise to the level of "arbitrary and capricious," it is difficult to conceive what does.

According to IIEC, the most recent decisions rejecting a roll forward of accumulated depreciation are "anomalous decisions in the long history of this issue," (IIEC Init. Reh. Br., p. 19), and reverse what IIEC suggest is an established practice of rolling forward accumulated depreciation. Similarly, AG/CUB says that "the issue of how to treat accumulated depreciation in the context of proposed pro forma additions has been a contentious one for years." (AG/CUB Init. Reh. Br., p. 15.) Both are wrong. There is *no* anomaly in consistent decisions based on consistent fact patterns. There are *no* decisions prior to the decision in ComEd, 01-0423, in which the Commission directly ruled on a utility's contesting of the proposed adjustment. And

apart from a minority, dissenting opinion in ComEd, 07-0566, the Commission has *never* wavered in its rejection of the proposed adjustment, when contested by the utility.

Rather, it is IIEC and AG/CUB who have not heeded the Commission's warnings that this issue was resolved. It is IIEC and AG/CUB who have proposed an adjustment that the Commission has rejected as improper in principle on multiple occasions. And it is IIEC and AG/CUB now who principally argue that the Commission can abandon without consequence the very established practice that they have fought so long to overturn. IIEC further suggests that the Commission's rulemaking in Docket 02-0509 "has already taken precisely the cautionary procedural steps" that the AIU recommend. (IIEC Init. Reh. Br., p. 31.) But IIEC cannot point to any excerpt of the Second Notice Order in Docket 02-0509 or any party's testimony in that proceeding that discussed the propriety of this proposed adjustment. And IIEC conveniently ignores the fact that the Second Notice Order was issued *two days before* the Commission issued the order in ComEd, 01-0423, the first in a series of cases that rejected the proposed adjustment. The Commission should reject IIEC and AG/CUB's revisionist history, just as it should reject their attempt to torpedo the Commission's long-standing practice. Even if IIEC and AG were correct in their assertions, this would only serve to highlight that different policy perspectives exist for the Commission's consideration in a rulemaking proceeding that might *actually* consider the very issue being contested here.

The inconsistencies in the Staff and Intervenor positions on when an adjustment to accumulated depreciation should occur and how such an adjustment should be calculated provide further evidence demonstrating why a rulemaking is necessary. Staff proposes a rule whereby accumulated depreciation would be rolled forward whenever a utility proposes "substantial" additions. (Staff Init. Reh. Br., pp. 4-5.) IIEC does not disagree with this rule in principle but

takes issue with what "substantial" should mean. (IIEC Init. Reh. Br., p. 17.) AG/CUB argues that the adjustment should be based on actual plant balances as of February 2010; a position with which Staff and IIEC forcefully disagree. (AG/CUB Init. Reh. Br., pp. 9-13.) Staff recognizes that the adjustment it proposed in this case would penalize two of the AIU utilities, but waffles on whether this penalty should be mitigated under Staff's alternative approach. (Staff Init. Reh. Br., p. 15; but see supra fn. 4.) None of the adjustments proposed by Staff and Intervenor on rehearing are of the same amount or follow the same methodology as proposed in the initial phase of this proceeding (to the extent that a party even proposed the adjustment at all initially). (AIU Init. Reh. Br., p. 14.) Nor are any of the adjustments proposed in the initial phase or on rehearing of the same amount as the Order's adjustment. (Id.) In short, the record in this case demonstrates substantial uncertainty about what is the appropriate adjustment to accumulated depreciation in this and any future utility rate case proceedings. Such varied approaches to the adjustment illustrate the benefit of a process whereby all interested parties can participate in developing a consistent, prospective approach – i.e., a rulemaking.

A misperception that Part 287.40 has led to undesirable results does not justify an arbitrary reinterpretation of the rule. Before it could alter its prior practice of rejecting the proposed adjustment, the Commission had to initiate a proceeding to provide clear notice to all interested parties at the outset of the proceeding that the Commission intended to revisit its prior interpretation and application of Part 287.40 concerning adjustments to accumulated depreciation. In the wake of four prior decisions where the post-test year adjustment to the reserve was contested by the utility and rejected by the Commission, it was not appropriate for the Commission to abandon that interpretation in a Final Order at the end of a subsequent rate case for another utility with analogous facts. As the Commission itself recognized, *just weeks*

after the AIU filed its direct case in this proceeding, "in the absence of a rule change, the Commission is not authorized to create such a selective two and a half year test year rule for depreciation on the historical rate base." (ICC ComEd Br., p. 12.) The adjustments to roll forward the balances of accumulated depreciation and ADIT in the Order must be reversed, and any reconsideration of the interpretation and application of Part 287.40 must occur outside the context of this rate case proceeding.

VII. With Regard To Cash Working Capital, What Is The Appropriate Methodology To Determine The Accuracy Of The $3.75 Million In Capital Costs That AIU Argues Should Be Netted Against $9.4 million Of Late Fee Revenues?

A. What Is The Appropriate Methodology To Determine Whether The $3.75 Million In Capital Costs Should Be Netted Against The $9.4 million Of Late Fee Revenues To Offset The Revenues With The Capital Costs?

With respect to cash working capital ("CWC"), on rehearing Staff agrees with the AIU's proposal to reflect in the revenue requirement the impact of a 28.13 day collection lag. (Staff Init. Reh. Br., pp. 17-18.) Staff further agrees that the revenue requirement impact of use of a 28.13 day collection lag is $3.75 million over the amount reflected in the Order. (Id., p. 17.) The only party to oppose the AIU's proposal is IIEC. As discussed below, despite the evidence of record on rehearing, IIEC continues to assert that a proxy collection lag of 21 days is more appropriate than the AIU's calculated collection lag.

As the AIU explained in their Initial Brief (pp. 25-26, 30), the AIU have customers who pay late. As the AIU do not timely receive revenues from those customers, there is a resulting cost to the AIU to obtain the equivalent working capital funds from some other sources. The costs related to late payment are determined in part through the collection lag component of revenue lag in a lead lag study. (Ameren Ex. 9.0RH, pp. 3-4.) Based on test year data, the AIU calculated a collection lag of 28.13 days. (Ameren Exs. 9.0RH, p. 4; 9.3RH.) Corrections to the calculation on rehearing showed that the actual collection lag was 35.11 days (although the AIU

continue to propose use of 28.13 days). (Ameren Exs. 9.0RH, p. 9; 9.4RH.) As the AIU's evidence on rehearing shows, then, the 28.13 day collection lag represents a conservative calculation of the collection lag. (Ameren Ex. 9.0RH, p. 10.)

The customer payment patterns that produce late payments and result in the associated costs also result in late payment fee revenues from late paying customers (totaling $9.4 million in the test year). (Ameren Ex. 16.0RH, p. 4; see AIU Init. Reh. Br., pp. 30-31.) These revenues are accounted for in the determination of the revenue requirement, and serve to reduce the level of tariffed rates that would otherwise be charged, to the benefit of ratepayers. It is therefore appropriate to include the full cost associated with late paying customers (through the collection lag component of CWC) in the revenue requirement as well. (Ameren Exs. 9.0RH, p.12-13.) Thus, the AIU propose that the $3.75 million difference in CWC costs arising from the use of a calculated 28.13 day collection lag, instead of the 21 day collection lag adopted in the Order, should be reflected in the revenue requirement.

The only party to oppose the AIU's proposal is IIEC. IIEC asserts that the Commission should reaffirm its adoption of a 21 day collection lag in the Order. (IIEC Init. Reh. Br., p. 36.) IIEC admits, however, that the 21 day collection lag is nothing but a proxy for a properly calculated collection lag, which in IIEC's own words is a "dollar-weighted average period of time in which customers pay their bills." (IIEC Init. Reh. Br., p. 38.) As the evidence on rehearing shows, the AIU have calculated a dollar-weighted average period of time in which customers pay their bills, based on actual test year data, which produced the 28.13 day collection lag. (Ameren Ex. 9.0RH, p. 9.) By contrast, IIEC witness Mr. Meyer admits that the 21 day collection lag "was *not* based on a calculation of average customer payment performance." (Ameren Ex. 16.1RH, p. 5, Data Response AIU-IIEC 11.16 (emphasis added).) The 21 day

collection period advocated by IIEC is not an average of any payment data, nor does it reflect any real or measured customer payment pattern. IIEC has provided no study, analysis, actual data, or other empirical evidence that supports the conclusion that the 21 day period is representative of the AIU's collection patterns. Further, Mr. Meyer did not perform a quantitative analysis in an effort to validate his assumption that the 21 day lag proposed by the IIEC represents an average of the AIU's customer payment performance. (Ameren Ex. 16.1RH, p. 6, Data Response AIU-IIEC 11.18.)

IIEC asserts that the AIU have provided no new evidence on rehearing to justify the 28.13 day collection lag. This is not the case. On rehearing, AIU witness Mr. Heintz reviewed the calculations supporting the collection lag. (Ameren Ex. 9.0RH, p. 9). Mr. Heintz's review revealed that the correct collection lag was actually 35.11 days. (Ameren Ex. 9.4RH.) IIEC does not dispute this corrected calculation. Mr. Heintz also pointed out that full aging of the 90+ day collection bucket would result in a longer collection lag. (Ameren Ex. 9.0RH, p. 10.) The AIU's updated data, therefore, clearly represent new analysis on rehearing which demonstrates that the AIU have employed a conservative collection lag in the determination of their CWC requirements. (Id.)

IIEC also claims that the AIU's collection lag improperly assumes that there is a connection between late payment fee revenues and the collection lag. (IIEC Init. Reh. Br., p. 37.) As Mr. Heintz explained, however, there is a connection: the same customer payment pattern that creates the actual collection lag also results in the late fee revenues. (Ameren Ex. 16.0RH, p. 4.) If customers were to pay earlier than they actually do (i.e., in 21 days as opposed to the AIUs' actual 28.13 day collection lag), late payment fee revenues would be lower than the actual test year levels. (Id., p. 6.) Although IIEC proposes a reduction of the collection lag to 21

days, IIEC does not propose an associated reduction in test year late fee revenues. For this reason, IIEC's proposed 21 day collection lag creates an imbalance by not reflecting the costs associated with the actual collection lag experienced during the test year, but allowing the entire amount of test year late fee revenues to reduce tariffed rates to the benefit of the AIU customers.

IIEC further suggests that the AIU are simply offering a re-checked, reevaluation of the collection lag presented in the case-in-chief, and that that collection lag was found deficient in the Order. (IIEC Init. Reh. Br., p. 36.) As discussed above and in the AIU's Initial Brief (p. 28), however, the AIU have done more than simply re-check their collection lag: they have re-run the calculation of the collection lag and demonstrated that, far from being deficient, the 28.13 represents a conservative collection lag calculation based on actual test year data. On rehearing, IIEC witness Mr. Meyer did not identify any "deficiencies" in the calculation of the 28.13 day collection lag presented by Mr. Heintz and did not dispute the corrected collection lag of 35.11 days. Mr. Meyer agrees that $3.75 million was calculated correctly and he does not contest the $9.4 million in late fee revenues. (IIEC Ex. 11.0RH, pp. 6-7.) Nevertheless, IIEC proposes on rehearing that, instead of a calculated collection lag, the Commission adopt a 21 day proxy period that is unsupported by any study, analysis, actual data, or other empirical evidence that it is representative of the AIU's collection patterns. For these reasons, the AIU's 28.13 day collection lag, calculated using test year data, is reasonable and appropriate, and the $3.75 million in costs associated with the difference between 28.13 collection days and 21 days should be included in the AIU's revenue requirement.

VIII. What, If Any, Adjustment Is Legally Appropriate With Regard To Pension And Other Post-employment Benefits?

Staff is the only party that objects to the AIU pro forma adjustment for pension expense. Staff claims that "AIU provides nothing which answers the question on rehearing about the legal

appropriateness of an adjustment." (Staff Init. Reh. Br., p. 18.) Staff is wrong. The AIU proposed a "legally appropriate" pro forma adjustment to pension and benefits expense *at the outset of this proceeding*. As required by Part 287.40, the AIU's adjustment was "individually identified" in direct testimony and "supported" by the most recent actuarial data from Towers Watson, the July 2009 mid-year actuarial report. The record *before rehearing* showed that the July 2009 mid-year report established that pension and benefits expense for the 12 months ending September 30, 2009 was "known and measurable." The rehearing record provides further support that the adjustment is legally appropriate.

Rather than address the merits of the evidence on rehearing, Staff spills most of its ink rehashing speculative theories why 2009 expense *could* have changed and rearguing its motion to strike the final 2009 actuarial report. (Id., pp. 18-22, 25.) The AIU explained prior to rehearing that 2009 expense amounts in the mid-year report *would not change*. The AIU offered the final year-end report on rehearing to *confirm* that 2009 expense amounts *did not change*. The AIU did not offer the final actuarial report to establish, for the first time in this case, that the adjustment is known and measurable. The known and measurable requirement was satisfied in the direct case by the July 2009 report, and confirmed on rehearing by the final actuarial report.

The Commission's prior orders demonstrate that it is "legally appropriate" to rely on the latest actuarial data to adjust test year pension and OPEB expense, regardless of whether that data represents projected or actual expense or whether that data is contained in a year-end or a mid-year actuarial report. Indeed, in ComEd's last two rate cases, the Commission accepted pro forma adjustments to test year pension and OPEB expense based on post-test year estimated expense *not* contained in a final report for that year. (AIU Init. Reh. Br., pp. 36-38.) The AIU's proposed adjustment based on expense amounts in the most recent actuarial report is consistent

with that past practice and thus "legally appropriate." To reject the AIU's adjustment would be an arbitrary and capricious departure from prior Commission practice.

A. *The AIU Established A Known And Measurable Adjustment To Pension And Benefits Expense During The Initial Phase Of This Proceeding.*

Staff claims that the Commission should not give any weight to any evidence that the AIU have submitted on rehearing, including the final actuarial report for 2009. (Staff Init. Reh. Br., p. 22.) The Commission, however, has already rejected this argument. The year-end actuarial reports for 2009 (Ameren Exs. 8.3RH-8.7RH) are part of the record, as are the testimonies of AIU witnesses Mr. Getz (Ameren Ex. 5.0RH, pp. 5-9), Mr. Lynn (Ameren Ex. 8.0RH-8.2RH) and Mr. Stafford (Ameren Ex. 18.0RH-18.5RH). This evidence was offered, not to establish that the adjustment was known and measurable, but to refute Staff's unsupported assertions that expense amounts in the July 2009 mid-year report could not establish a "known and measurable" adjustment to pension and OPEB expense. In any event, Staff cannot credibly object to the Commission considering rehearing evidence on pension and OPEB expense, while it is simultaneously offering its own rehearing evidence to attempt to support an adjustment to accumulated depreciation and ADIT that Staff did not even propose until rehearing.

From the outset of this case, the AIU presented evidence establishing that the most recent actuarial data available provides for a known and measurable level of pension and OPEB expense. (AIU Init. Reh. Br., pp. 33-40.) The AIU identified with specificity the pro forma adjustment in their direct case and provided Staff with the underlying support for the adjustment before Staff even filed its direct case and months before the initial evidentiary hearing. (Id., pp. 33-35.) Staff admits that the mid-year July 2009 report was the latest available data when the AIU proposed the adjustment, (Reh. Tr. 168 (Ebrey)), yet it rejected the adjustment, claiming that only a final actuarial report for the calendar year 2009 would be sufficient, (ICC Staff Ex.

15.0 (Ebrey Reb.), p. 19). But the AIU have shown that both Staff and the Commission regularly have relied upon the latest actuarial data in establishing pension and OPEB expense, regardless of whether the data was from a mid-year or year-end report or represented projected or actual expense, even if that data was not yet available at the time of the utility's initial filing. (AIU Init. Reh. Br., pp. 36-37.) Staff's continued insistence that the July 2009 mid-year report cannot be the basis for a pro forma adjustment remains at odds with the Commission's and its own practice.

Staff continues to argue that the update to 2009 expense between the January 2009 and July 2009 actuarial reports illustrates how 2009 expense *could* have changed again upon issuance of the January 2010 report. (Staff Init. Reh. Br., p. 23.) Part 287.40, however, does not require a utility to demonstrate that the amount of its proposed pro forma adjustment "could not change." The rule requires the utility to establish that the change is "reasonably certain" to occur during the pro forma period at a measurable amount. Staff itself acknowledges that the AIU's actual expenditures for pro forma plant additions were less than the allowed adjustment, even though Staff concluded that the adjustment was still known and measurable. (Id., p. 25.).

The July mid-year actuarial report determined the AIU's 2009 pension and OPEB expense based on *actual* plan asset values, financial markets conditions and employee census data for the prior fiscal year. (AIU Init. Reh. Br., p. 38.) No significant plan event occurred in 2009 that would have required an adjustment to the expense amounts in the proposed adjustment. (Id., p. 39.) Staff acknowledges that the expense for the 12 month period ending September 30, 2009 was "based on the amounts actually recorded on the books of the AIU," (ICC Staff Ex. 15.0, p. 19), and "known prior to hearings in December 2009," (Ameren Ex. 18.2RH). And the AIU's actuary stated *in the initial phase of this proceeding* that the expense booked through September 30, 2009 "will not change" upon issuance of the 2009 year-end report. (AIU Init Reh.

Br., p. 40.) The final report for 2009 confirms that the amounts in the July 2009 report did not change. Why Staff continues to argue about what could have happened instead of what did happen is beyond comprehension.

Staff also argues that the AIU should have timed the filing of this case so that the final year-end actuarial report for 2009 would be available for review. (Staff Init. Reh. Br., pp. 19-20.) But the Commission has never held that an adjustment must be supported by a year-end actuarial report. Nor have the AIU attempted to support its adjustment on rehearing with the final report for 2009. Rather, the Commission consistently has approved adjustments based on the most recent actuarial data available. Yet, Staff stubbornly claims that the July 2009 mid-year report is insufficient, even though it is the latest available actuarial data and despite the AIU's actuary's testimony that the amounts contained in the report that the AIU seek to recover would not change upon issuance of the final report. Staff is correct that "timing" is critical to any analysis of this issue. Here, Staff had the time to review the July 2009 mid-year report and the benefit of the actuary's testimony that the 2009 expense amounts in that report would be booked and would not change. Regardless of the availability of the year-end report for 2009, the existing record prior to rehearing establishes the AIU's proposed pro forma adjustment as known and measurable.

B. *The "Workforce Reduction" Already Deducted The Future Pension And Benefits Expense For Separated Employees.*

After claiming that a pension and OPEB expense adjustment can only be supported by a year-end report, then rejecting outright any consideration of the year-end report in this matter, Staff fires the final arrow in its quiver: the year-end report now cannot be the basis for any pro forma adjustment whatsoever because it did not reflect an immaterial reduction in employee

headcount. As explained below and in the AIU's Initial Brief, Staff's argument here badly misses its mark.

As previously explained, the Commission has always accepted independent actuarial reports as the basis for establishing pension and OPEB expense. (AIU Init. Reh. Br., pp. 36-37.) Staff now claims that in this instance an actuarial report, even though it matches the AIU's actual booked expense, cannot be relied on for ratemaking purposes. In their Initial Brief, the AIU explained that Staff's argument was yet another red herring since the workforce reduction (a) would only have impacted fourth quarter expense if it had been a significant plan event; and (b) could not be a significant plan event based on generally accepted accounting principles. (AIU Init. Reh. Br., pp. 40-41.) Staff can neither identify a prior example where a workforce reduction during the calendar year used to set expense impacted the accrued expense for that year, nor explain what should be used use to set expense when a workforce reduction has occurred, if not the actuarially-determined expense accruals. (Id.)

Staff claims that "the very concern Staff has in the AIU cases concerning a change in workforce which was not reflected in the actuarial report, was in fact reflected in the ComEd actuarial report relied on [in ComEd, 05-0597]." (Staff Init. Reh. Br., p. 25.) But Staff's own proposal to use older 2008 actuarial report data as the basis to set pensions and benefits expense renders Staff's claim moot because the 2008 actuarial report also does not consider or adjust for the workforce reduction. Furthermore, Staff failed to rebut testimony pointing out that, even if it were appropriate "for rate making purposes" to adjust pension expense based on an immaterial reduction in headcount that only impacted future year expense, the "workforce reduction" in this case already adjusted the revenue requirement to deduct the very costs associated with those separated employees. (AIU Init. Reh. Br., p. 41.) As a result, the AIU's proposed adjustment,

when coupled with the deduction already reflected in the Order's appendices, does in fact address Staff's concern.

More importantly, Staff completely ignores the fact that in ComEd, 05-0597, Staff accepted a downward revision to ComEd's pension expense adjustment based on a *forecast of estimated 2005 expense in the year-end 2004 report*. (Id., pp. 37-38.) In that proceeding, Staff did not demand that the adjustment be based on a year-end report for 2005. Staff did not question whether the 2005 estimated expense would change upon the issuance of the year-end report. And Staff was not concerned about the impact on 2005 estimated expense of any reduction in headcount that might occur. Indeed, the equivalent adjustment in this case would have been if Staff accepted *the forecast of 2009 expense in the year-end 2008 report issued in January 2009*. But here Staff will not even accept actual booked expense for 2009. To claim here that *actual* expense in a mid-year report cannot support an *increase* in the revenue requirement, while accepting in other dockets forecasted expense to support a *reduction* in a proposed adjustment, defies not only logic, but credibility as well.

The existing record and record on rehearing establish that the AIU's pro forma adjustment to pension and benefits expense is legally appropriate. No untoward precedent will be set by allowing an adjustment based on the most recent actuarial data available that is fully consistent with the Commission's prior practice. In this case, the Commission has the added benefit of knowing that the most recent actuarial data available matched exactly the amounts booked by the AIU and in the year-end 2009 report. The Order on Rehearing should accept this adjustment.

IX. Clarifications concerning the Public Utility Revenue Act ("PURA") tax and its Recovery in Light of the Commission's Expressed Intent.

A. *Response to Staff*

1. Staff and the AIU Agree on the Separate Volumetric Charge

The AIU and Staff agree that it is appropriate to establish a separate volumetric charge to recover PURA tax expense. (Staff Init. Reh. Br., p. 27.) The AIU's proposal separately identifies the PURA tax as a per-kWh line item pursuant to the directives in the NOCA. Although Staff's Brief does not specify how the "volumetric" charge should be billed to customers, presumably Staff does not object to recovery of PURA tax expense through a separately identified *per-kWh-based* charge. Staff and the Companies' disagree with regard to whether the annual tax recovered from customers should be subject to a prospective adjustment in order to match the Companies' actual tax liability.

2. A True-up of PURA Taxes Is Necessary and Appropriate

The AIU disagree with Staff's proposal to remove the true-up provision from the AIU's proposed Tax Additions Tariff. (See Staff Init. Reh. Br., pp. 27-28.) Specifically, Staff argues that the PURA tax should be recovered as a static per kWh-based charge. Such a charge would fail to "pass through" the actual amount of tax to customers, however, because the amount recovered from customers would be different than the Companies' actual tax liability. (AIU Init. Reh. Br., pp. 45-48.) If Staff's proposal is accepted, taxes recovered from customers would be based on a fixed rate in the tariffs and, as a result, aggregate recovery ultimately would depend on kWh usage of customers. The amount received by the Companies would invariably be greater or less than the actual tax assessed.

Under Staff's proposal, it would be possible for the Company to earn a margin on a line item separately identified as a tax on customer bills. This proposal does not seem to logically

square with the express intent stated in the NOCA. Customers should be able to expect when they pay a charge labeled as a tax, it equals the actual tax liability, no more and no less.

In sum, Staff's proposal does not meet the requirements of the NOCA. In its Initial Brief and Rehearing Testimony, the AIU provided a more detailed explanation of how its tariff proposal met the requirements of the Commission's NOCA in contrast to the proposals and criticisms offered by Staff and IIEC. (AIU Init. Reh. Br., pp. 44-48; Ameren Ex. 17.0, pp. 3-4, 9-14.) That detailed argument need not be repeated here.

3. Reconciliation Would Not Be "Cumbersome"

In its Initial Brief, Staff claims that reconciliation would be "cumbersome." However, Staff provides no basis for such a conclusion. (Staff Init. Reh. Br., p. 29). There would be no prudence review associated with the payment of a compulsory tax and an accounting reconciliation would need to be conducted only at the Commission's election. The only issue to be addressed in such a proceeding would be checking the math to ensure that the utility recovered only the actual tax liability it paid in a given period. Any reconciliation, therefore, would require only an arithmetical check and could be completed easily. (See Ameren Ex. 17.0RH, p. 13.)

4. AIU's Withdrawal of the PURA Tax True-up Proposal in the Direct Case Does Not Preclude the Commission from Accepting this Proposal on Rehearing

Staff complains that the Commission should not accept the true-up proposal because the AIU withdrew this proposal in the direct case. On rehearing, however, the Commission has plainly expressed its intent to recover PURA tax as a pass through tax. The AIU presented its rehearing proposal in light of this statement of intent in the NOCA. Apart from implementation of a periodic true-up, the AIU can conceive of no other means to treat the PURA tax as a "pass

through tax," whereby the amount charged to customers ultimately equals the tax paid by the utility less applicable credits.

5. Staff Agrees that IIEC's Retroactive Refund Proposal Should Be Rejected

The AIU agree with Staff's concerns regarding IIEC's request for refunds related to PURA tax charges. IIEC's proposal constitutes retroactive ratemaking and, thus, is prohibited by Illinois law. (AIU Init. Reh. Br., pp. 44-45.)

6. Conformance to the Revenue Requirement Should Follow the AIU's Proposal

The AIU disagree with Staff's claim that the AIU approach "fails to grasp the problems Ameren's approach created in the previous phase of the case…." (Staff Init. Reh. Br., p. 31.) Abandoning rate uniformity among the AIU companies is not necessary, nor is it advisable in remedying the problems related to the PURA tax.

The "problems" alluded to by Staff were the result of conflicting directives in the Order that resulted in unintended consequences related to the DS-4 customer class and the establishment of a separate PURA tax charge. (Id.) Those issues are resolved in the AIU's rehearing proposal through the complete removal of PURA tax charges from revenue requirement and associated base rates. (AIU Init. Reh. Br., pp. 42-45.) Moreover, the AIU propose to adjust rates to conform to the final revenue requirement in a manner that maintains proper segregation of charges. (Id., pp. 49-50.)

On rehearing, the AIU are seeking to avoid additional unintended consequences by maintaining the rate design findings approved as part of the Order that are not subject to rehearing. Specifically, consistency and relative uniformity among the AIU's tariffs should not be abandoned. (Ameren Exhibit 17.0RH, pp. 5-8.)

Staff's proposal would increase the divergence in rates between the companies. This result is not consistent with the Commission's acceptance of AIU's rate design proposal contained on page 287 of the Order. Therefore, the AIU propose a methodology that preserves the general goals and structure of the underlying rate design while at the same time sets rates in a manner that corrects the problems associated with recovery of the PURA tax.

B. *Response to IIEC*

1. IIEC's Retroactive Refund Proposal Should Be Rejected

On pages 39-42 of its Initial Brief, IIEC states that PURA tax expense is currently being over-collected by the AIU and the PURA tax amount should be reduced. IIEC then suggests the AIU should be ordered to refund $2 million in PURA tax collections that IIEC alleges has been collected "unlawfully." (IIEC Init. Reh. Br., pp. 41-42.) As explained in their Initial Brief, the AIU have proposed that the PURA tax assessed to customers should be reduced by the applicable credit memoranda value going forward as a function of proposed revisions to the AIU Tax Additions Rider. (AIU Init. Reh. Br., p. 43.) IIEC's retroactive refund proposal, however, should be rejected.

IIEC's argument in support of refunds falls short both on its logic as well as its merits. Contrary to IIEC's aspersions, the record reflects that the AIU did not undertake any unilateral or inappropriate action with regard to submitting its compliance rates. The AIU appropriately submitted compliance tariffs to the Commission for review to ensure the AIU's final rates were in keeping with the Order. (Ameren Ex. 17.0R, pp. 11-12.) Once placed in effect after the Commission's review, the AIU *must* charge the rates set forth in its tariffs. 220 ILCS 5/9-240. As the AIU explained in their Initial Brief (pp. 43-44), and as Staff agrees, a refund of amounts collected under filed rates, as IIEC proposes, would be improper retroactive ratemaking.

Additionally, even IIEC acknowledges the contradiction and problems related to the PURA tax resulting from the Order in its Petition for Rehearing. (See IIEC Application for Rehearing, pp. 19.) In pertinent part, IIEC stated as follows:

> Unfortunately, without explanation, the appendices removes both revenues and expenses associated with the PURA Tax from the Ameren revenue requirements. The compliance rates filed by Ameren and approved for filing by the Commission Staff include rider recovery of the PURA Tax. None of these actions are consistent with the language in the Final Order. (Id.)

Hence, IIEC acknowledges the inconsistency present between the Order and appendices. That inconsistency gives rise to this rehearing issue. It is illogical for IIEC to now claim, having the benefit of the Commission's stated intent on rehearing, that refunds are warranted. Such hindsight application of intent is illogical, unfair, and would only serve to undermine the finality of Commission rate decisions.

As for the legal infirmities of IIEC's refund proposal, both the AIU and Staff have correctly identified that retroactive ratemaking is illegal in Illinois. Asking the Commission to effectuate a refund on rehearing to make up for an inconsistency in the underlying Order is a clear request for a retroactive change in rates. See Citizen's Utility Co. vs. Illinois Commerce Comm'n (1988), 124 Ill.2d 195, 207; BPI I, 136 Ill. 2d at 209. The retroactive ratemaking issue has been fully discussed in Initial Briefs and need not be repeated here. (See AIU Init. Reh. Br., pp. 43-44; Staff Init. Reh. Br., pp. 30-31.)

2. The AIU's Reconciliation Proposal Is Consistent with the NOCA's Intent

While the term "reconciliation" is not used in the NOCA, such a process is essential to the administration of collecting the tax from customers in a manner comparable to how other pass through taxes in the Tax Additions Tariff are collected. (AIU Init. Reh. Br., p. 45.) The PURA tax is assessed annually, and in order for the AIU to pass the tax through to its customers

on a monthly basis, the AIU must have a means of doing so. (Id.) The reconciliation process allows the AIU to assess the tax monthly and ensure that its customers pay the amount of tax less applicable credit, no more, no less.

Thus, a reconciliation is the means by which the AIU treat the PURA tax as a pass through tax like other taxes collected as part of the Tax Additions Tariff. The AIU can conceive of no other means by which to do so, and the IIEC have not proposed an alternative mechanism that accomplishes the same end.

Like Staff, IIEC also complains that the reconciliation process would be burdensome. (IIEC Init. Reh. Br., p. 43.) As noted above in response to Staff, there are no prudence issues related to the AIU's payment of compulsory taxes. Thus, the reconciliation would involve only an arithmetical check on the AIU's recovery of associated PURA tax dollars.

IIEC's comments regarding "variability" are not relevant to the AIU's proposal. (IIEC Init. Reh. Br., p. 43.) The AIU are not proposing to address variability with its Tax Additions Tariff. The AIU are proposing a method by which to treat the PURA tax as a pass through tax in a fashion similar to other taxes contained in the Tax Additions Tariff and consistent with the directives containing in the NOCA.

Finally, IIEC argues that the PURA tax is distinguishable from other taxes in the Tax Addition Tariff because the law imposes the tax on the utility rather than its customers. (IIEC Init. Reh. Br., p. 44.) The party ultimately liable for payment of the PURA tax is irrelevant. The AIU are legally responsible for remitting both the Electricity Excise Tax and the PURA tax to the taxing entities, and both of these taxes are fully dependant on customer consumption. Further, as noted in the AIU's initial brief, the PURA tax and other taxes in the Tax Additions Tariff can be characterized as excise taxes. (AIU Init. Reh. Br., pp. 47-48.)

For the reasons discussed above and in the AIU Initial Brief, IIEC's proposals regarding PURA tax should be rejected.

X. Conclusion

For the reasons discussed herein and in the AIU's Initial Brief on Rehearing, the AIU's proposed adjustments on rehearing should be accepted consistent with the schedules that the AIU submitted in their August 27, 2010 response to the ALJ's Post-Record Data Request.

Dated: September 23, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mark A. Whitt, an attorney, hereby certify that on September 23, 2010, I served a copy of the foregoing REPLY BRIEF ON REHEARING OF THE AMEREN ILLINOIS UTILITIES by electronic mail to the individuals on the Commission's Service List for Dockets 09-0306 – 09-0311.

By: */s/ Mark A. Whitt*
One of its attorneys